STATE OF MICHIGAN

COURT OF APPEALS

MARY O. DENNIS, Plaintiff-Appellee,	UNPUBLISHED July 28, 2011
v	No. 298103 Wayne Circuit Court
HENRY FORD HEALTH SYSTEM, d/b/a HENRY FORD HOSPITAL, Defendant-Appellant.	LC No. 09-022781-NH

Before: MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this action for medical malpractice, defendant appeals by leave granted from a circuit court order denying its motion for summary disposition that was brought pursuant to MCR 2.116(C)(7) (statute of limitations). We reverse.

The material facts are not disputed. The alleged malpractice occurred on May 2, 2006, when plaintiff had a colonoscopy at Henry Ford Hospital. On September 11, 2008, while plaintiff was hospitalized for another issue, a group of doctors informed her, in the presence of her daughter, that she had colon cancer that had existed for at least five years. When plaintiff asked the doctors why the cancer was not detected when she had her colonoscopy in 2006, they did not answer. At her deposition, plaintiff agreed that as of September 11, 2008, she "had a question in [her] mind as to why this cancer had not been diagnosed through the colonoscopy in 2006[.]" More than six months later, plaintiff's attorney served defendant with a NOI concerning the May 2, 2006, colonoscopy. The NOI is dated March 19, 2008. Plaintiff filed her complaint on September 16, 2009.

Defendant filed a motion for summary disposition, arguing that plaintiff's action was barred by the statute of limitations because it was filed more than two years after the alleged malpractice, MCL 600.5805(6), and more than six months after plaintiff discovered or should have discovered the existence of her claim, MCL 600.5838a(2). Plaintiff did not dispute that her action was filed more than two years after the alleged malpractice, but argued that it was timely under the six-month discovery provision. The trial court rejected defendant's argument that the six-month discovery period began to run on September 11, 2008, when plaintiff was informed that she had colon cancer that had been present for at least five years based on its size, and inquired why it had not been discovered two years previously. Rather, the court ruled that the

period did not commence until plaintiff was released from the hospital on September 23, 2008, because she was not in a position to pursue any claim before that date. Because plaintiff served her NOI less than six months later, and the NOI tolled the limitations period, the trial court denied defendant's motion.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted pursuant to MCR 2.116(C)(7) when a claim is barred because of the statute of limitations. "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

"In general, a plaintiff in a medical malpractice case must bring [a] claim within two years of when the claim accrued or within six months of when he [or she] discovered, or should have discovered, [the] claim." *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 219; 561 NW2d 843 (1997); MCL 600.5805(6); MCL 600.5838a(2). The parties do not dispute that plaintiff failed to bring her claim within two years after it accrued. Rather, the parties agree that the timeliness of plaintiff's action depends on the six-month discovery rule in MCL 600.5838a(2), which states:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, *or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later*. However, except as otherwise provided in section 5851(7) or (8), the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim. *The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff.* A medical malpractice action that is not commenced within the time prescribed by this subsection is barred. . . . [Emphasis added.]

"[T]he discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." *Solowy*, 454 Mich at 222. "'Once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action.'" *Id*., quoting *Moll v Abbott Laboratories*, 444 Mich 1, 23-24; 506 NW2d 816 (1993) (emphasis omitted). The standard "does not require that the plaintiff know that the injury [], in the form of the advancement of the disease process, was in fact or even likely caused by the defendant doctors' alleged omissions." *Solowy*, 454 Mich at 224.

There is no genuine issue of material fact that plaintiff actually discovered the existence of her claim on September 11, 2008, when doctors informed her that she had colon cancer in a size indicative of its existence for five years. Her question concerning the failure to diagnosis the cancer during the 2006 colonoscopy demonstrates that she "was armed with the requisite knowledge to diligently pursue her claims." *Solowy*, 454 Mich at 225. Plaintiff's arguments that she did not "genuinely" know of her cause of action until after "reflection and consultation with

other medical authority(ies)" is incompatible with the statute and *Solowy*. Plaintiff discovered her cause of action on September 11, 2008, which is more than six months before she filed her NOI.

The trial court and parties may have confused the discovery rule with a tolling provision. Under some circumstances, the running of limitations periods may be tolled, generally for the purpose of protecting people under certain kinds of disabilities that preclude them from being able to commence a suit. See *Klida v Braman*, 278 Mich App 60, 71; 748 NW2d 244 (2008). For example, the Legislature has addressed a claimant's inability to pursue a claim in provisions such as MCL 600.5851 (the insanity saving provision), MCL 418.381 (incapacity under the Worker's Disability Compensation Act), and MCL 691.1404(3) (incapacity to provide requisite notice under the defective highway exception to governmental immunity). Even if the discovery rule contained an incapacity provision, which it does not, plaintiff actually discovered her cause of action. As it is, we do not agree that plaintiff was disabled or incapacitated within the meaning of any tolling provision merely because she was hospitalized. Nothing in the record indicates that she was, for example, in a coma, declared incompetent or insane, medicated to the point of obliviousness, incommunicado, or otherwise unable to take any steps to protect or pursue her rights.[1] Even if the trial court and the parties had properly identified the issue as one of tolling rather than discovery, no basis exists here for tolling the period within which to file suit.

The undisputed facts demonstrate that plaintiff's NOI was not served until more than six months after plaintiff discovered or should have discovered on September 11, 2008, that she had a claim for malpractice arising from the May 2006 colonoscopy. Accordingly, the six-month discovery period had already expired by the time the NOI was served. The trial court erred in denying defendant's motion for summary disposition.

Reversed and remanded for entry of summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause

[1] There may be a number of other possible reasons why a person might realistically be unable to pursue a claim. We do not purport to decide what those situations might be. We merely hold that it is not per se enough *just* to be hospitalized, as the trial court apparently found.